
OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2010-4

October 18, 2010

OFFICIAL OPINION 2010-4

Mr. Steven J. Johnson
Executive Director
Indiana Prosecuting Attorneys Council
302 W. Washington St., Room E205
Indianapolis, Indiana 46204

RE: Prosecutors Offices and Hatch Act

Dear Mr. Johnson:

You have requested an opinion regarding whether or not the prosecuting attorney's office in Indiana is covered under the Federal Hatch Act. It is my opinion that in Indiana, the prosecuting attorney's office is not considered a "state or local agency" under the Hatch Act.

Brief Answer

Indiana offices of prosecuting attorneys do not fall under the definition of "state or local agency" for purposes of the Hatch Act. Because Indiana law shows that prosecuting attorneys are not a part of the executive branch of government, the prosecutors and their employees are not covered by the Act.

Analysis

Originally passed in 1939, The Federal Hatch Act was enacted to prevent certain government employees from participating in partisan political activity in hopes that it would prevent misuse of government funds. The Office of Special Counsel (OSC) has the important responsibility of investigating alleged violations of the Hatch Act. See 5 U.S.C. § 1216(a)(2). If the OSC brings charges, they are adjudicated by the Merit Systems Protection Board (Board). See 5 U.S.C. §§ 1504-1508. At the state and local level, the Hatch Act applies to employees of State or local agencies whose "principle [*sic*] employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency." 5 U.S.C. § 1501(4). A "State or local agency" is defined as the "executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." 5 U.S.C. § 1501(2).

The Merit Systems Protection Board uses state law to determine whether a particular agency is a part of the executive branch of a state. See *Ohio v. United States Civil Service Commission*, 65 F. Supp. 776 (S.D. Ohio 1946), *Special Counsel v. Bissell*, 61 M.S.P.R. 637, 642 (1994). In *Bissell*, the Merit Systems Protection Board took up the certified question of "whether the Tennessee Public Service Commission (TPSC) is an entity within the meaning of 5 U.S.C. § 1501(2)." *Bissell* at 639. In short, the Board had to determine if the TPSC belonged to the executive branch of government. The Board stated, "because the Hatch Act specifically states that a covered State employee must work in an agency within the 'executive branch of a State,' State law is the appropriate and convenient measure of the governing federal law in determining what agencies are within the executive branch of State government." In making their determination, the board stated that the "critical factor to examine is not what functions the agency performs but rather which branch of government controls the TPSC, and/or how the state has perceived that agency's place in state government." *Id.* at 643. In determining what branch of government controls, the Board considered such factors as: (1) who controlled the funding of the agency, (2) who controlled the personnel policies, and (3) whether the agency head was appointed by the executive or if they were separately elected. *Id.* at 644-647

In Indiana, the prosecutor's office is not a part of the executive branch. The executive branch controls neither funding nor personnel policies of prosecuting attorneys. See [IC 33-39-6-5](#) (establishing the minimum salary of the prosecuting attorney and stating that it is paid from the general fund) [IC 33-39-6-2\(g\)](#) (requiring the county council, the legislative branch of the county, to appropriate funds for the prosecuting attorney's office); Ind. Att'y Gen. Op. 2001-11 (stating that prosecuting attorneys themselves establish the terms of employment for their deputies and they are not subject to a county's personnel policy). Additionally, prosecuting attorneys are separately elected, not appointed by a member of the executive branch. See Ind. Const. Art. 7 § 16 (establishing

that a prosecuting attorney shall be elected for each judicial circuit). Even when the prosecuting attorney resigns or is removed from office, the governor is not the first choice to appoint a replacement. Compare [IC 3-13-6-2](#) (stating that vacancies in the office of the prosecuting attorney are to be filled by the governor only if the outgoing prosecuting attorney was not a member of a major political party), with [IC 3-13-4-3](#) (giving the governor the authority to appoint replacements in the case of a vacancy in a state office).

Also, Indiana prosecuting attorneys are not considered to be a part of the executive branch of government.^[1] The office of the Prosecuting Attorney was established under the judicial article of the Indiana constitution beginning in 1851. See Ind. Const. Art. 7 § 16. (stating, "there shall be elected in each judicial circuit by the voters thereof a prosecuting attorney"). The Indiana Supreme Court interprets this section as meaning that the prosecuting attorney is a judicial officer. See *State v. Henning*, 33 Ind. 189 (1870), *State v. Ellis*, 184 Ind. 307, 112 N.E. 98 (1916), *State v. Spencer Circuit Court*, 244 Ind. 552, 556, 194 N.E.2d 606, 608 (1963), *Williams v. State*, 430 N.E.2d 759, 765 (Ind. 1982). *Williams*, a death penalty case, considered the argument that by giving the discretion to charge the death penalty to the prosecuting attorney, the legislature was improperly delegating its authority to the executive branch and usurping the judicial function of imposing criminal penalties. *Williams* at 665. The court found that this argument had no merit because the prosecuting attorney was a judicial officer. *Id.* The court stated as a judicial officer any discretionary power given to the prosecuting attorney is exercised under the control of the judicial branch. *Id.*

Other states, with constitutional provisions similar to Indiana, have also determined that their prosecuting attorneys are not a part of the executive branch. See, e.g. N.M. Const. Art. VI § 24; Idaho Const. Art. V § 18; Mont. Const. 1889 Art. VIII § 19.^[2] These sections have been interpreted to mean that the prosecuting attorney is a part of the judicial branch. See e.g. *State v. Wharfield*, 41 Idaho 14, 236 P. 862, 863 (1925) (holding that the prosecuting attorney is not an executive officer); *State v. Hensley*, 171 Mont. 38, 554 P.2d 745, 747 (1976) (holding that for the purposes of its bribery statute, a deputy county attorney was not an executive officer).

The OSC itself has agreed that New Mexico's constitutional section placing its district attorneys under the judicial article means that the district attorneys are not in the executive branch. OSC Op, File No. AD-06-0147 (Dated 20 Apr. 2006). In that opinion letter, the OSC recognizes that the district attorney's office is not in the executive branch but rather "they are part of the judicial branch". *Id.* "Accordingly, because the Hatch Act applies only to employees in executive agencies, an attorney in the DA's Office is not covered by the provisions of the Act." New Mexico district attorneys, therefore, are not subject to the Hatch Act and may run as a candidate in a partisan election. *Id.*

Conclusion

It is the opinion of the Office of the Attorney General that an Indiana prosecuting attorney's office is not considered a "state or local agency" for purposes of the Hatch Act since it is not controlled by the executive branch of government. An employee of the prosecutor's office, therefore, is not covered by the Act.

Sincerely,

Gregory F. Zoeller
Attorney General

Gordon White
Deputy Attorney General

^[1] But see *Schweitzer v. State*, 700 N.E.2d 488, 493 (Ind. Ct. App. 1998) (Concurring) (stating that prosecuting attorneys are a part of the executive, but relying on a functional analysis rather than a constitutional analysis).

^[2] Montana's current constitution, which was adopted in 1972, does not refer to county attorneys as being in the judicial branch.